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ARTICLE: President and Their Papers. *

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TEXT:

INTRODUCTION

Early in the third decade of the nineteenth century, a twenty-five-year-old French magistrate, Alexis de Tocqueville, came to the United States on an official mission to examine its prison facilities. His observations of our society, however, ranged widely beyond this limited purpose, culminating in 1835 with the publication of his book, Democracy in America, n1 still considered a useful and penetrating analysis of the strengths and weaknesses of our system of government. As to its weaknesses, nothing Tocqueville said continued to be more pertinent than these words:

n1. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (G. Lawrence trans. 1966).

[In America, no one] bothers about what was done before his time. No method is adopted; no archives are formed; no documents are brought together, even when it would be easy to do so. When by chance someone has them, he is casual about preserving them. Among my papers I have original documents given to me by public officials to answer some of my questions. American society seems to live from day to day, like an army on active service. n2

n2. Id. at 192.

The actions of United States Presidents both before and after Tocqueville's visit amply support his generalization as to America's disregard of its historical documents. Following a precedent set by George Washington, Presidents have uniformly viewed any papers accumulated during their terms in office as personal property, to be removed or even destroyed at their will. This concept of private ownership has made collection and maintenance of presidential papers difficult and has resulted in the loss of many historical documents.

The problem was somewhat alleviated by President Franklin D. Roosevelt's establishment of the first library for presidential materials n3 and by passage in 1955 of the Presidential Libraries Act. n4 The Act provided an explicit legal basis for accepting any papers Presidents wished to donate. Because the

concept of private ownership remained unchallenged, however, collection of presidential papers still depended upon the whims of each President.

n3. See infra notes 39-40 and accompanying text.

n4. Pub. L. No. 373, 69 Stat. 695 (codified as amended at 44 U.S.C. §§ 2107-2108 (1976).

That curious and unsettling passage in our national history known as Watergate left its mark on the problem of presidential papers. President Nixon's unsuccessful attempt to remove documents and tapes from the White House following his resignation led Congress to reexamine the principle that Presidents possess legal ownership of those papers accumulated during their tenure. This reexamination resulted in passage of the Presidential Recordings and Materials Preservation Act n5 and, eventually, to enactment of the Presidential Records Act of 1978, n6 which sought to resolve the question of legal ownership of presidential documents.

n5. Pub. L. No. 93-526, 88 Stat. 1695-99, 1701 (codified as amended at 44 U.S.C. §§ 2107 note, 3315-3324 (1976)).

n6. Pub. L. No. 95-591, 92 Stat. 2523 (codified at 44 U.S.C. §§ 2201-2207 (Supp. V 1981)).

This paper traces the development and modification of the concept of private ownership of presidential papers. It first summarizes the historical development of the concept and resultant problems. Next, it traces former President Nixon's role in prompting congressional reexamination of the private ownership concept and enactment of the Presidential Recordings and Materials Preservation Act. Further examined are President Nixon's legal challenges to the Act, as well as other early litigation, none of which resolved the private ownership question. Finally, this paper delineates Congress's attempt to resolve the question of private ownership through passage of the Presidential Records Act, and describes the problems that remain.

I. HISTORICAL TREATMENT OF PRESIDENTIAL PAPERS

A. THE CONCEPT OF PRIVATE OWNERSHIP

Beginning with George Washington, Presidents have assumed that papers accumulated during their tenure in office are their personal property. Upon completing his term in office, Washington took the bulk of his personal papers with him to Mount Vernon. n7 Although he apparently gave some thought to building a separate facility on his estate to house his papers, this prospect was terminated by his early death. In his will, Washington devised his papers to his nephew, Supreme Court Justice Bushrod Washington. n8

n7. See Berman, The Evolution and Value of Presidential Libraries, in THE PRESIDENCY AND INFORMATION POLICY 80 (H. Relyea ed. 1981).

n8. Id. at 81.

Justice Washington proved unthinkingly generous in providing access to those papers. His lack of discretion in this regard resulted in widespread dispersal of the papers, so much so, indeed, that much of "the public's heritage ended

up in private hands." n9 Most of what remained in Justice Washington's hands -- mainly official records -- were sold in 1834 by his nephew and heir, George Corbin Washington, to the United States government for $25,000. n10 Fifteen years later, Congress purchased the late President's remaining private papers from the same source for $20,000. n11

n9. Id.

n10. Id. For a discussion of President Washington's treatment of his papers, see McDonough, Hoxie & Jacobs, Who Owns Presidential Papers?, 27 MANUSCRIPTS 2 (1975).

n11. Berman, supra note 7, at 81.

In making these purchases, Congress apparently assumed that the papers were privately owned. United States Presidents following Washington shared that view, removing their papers either upon departing from the White House or immediately thereafter. n12 Congress strengthened this assumption by purchasing additional presidential papers from their "owners," usually Presidents' heirs. n13

n12. See Fridley, Should Public Papers Be Private Property?, 44 MINN. HIST. 37 (1974).

n13. Id. For example, the bulk of Thomas Jefferson's papers were purchased in 1848 by the Department of State from the President's executor, Thomas Jefferson Randolph, for $20,000. Congress appropriated $20,000 to purchase James Monroe's papers in 1849. Dolly Madison, James Madison's widow, sold a portion of his papers to the Department of State in 1837 for $25,000 and a second installment in 1848 for the same amount. Hirshon, The Scope, Accessibility and History of Presidential Papers, 1 GOV'T PUBLICATIONS REV. 363, 378-79 (1974).

The assumption of private ownership made the collection and preservation of presidential records a difficult task. For example, one hundred seperate acquisitions were made in the course of the government's efforts to acquire the scattered holdings of the papers of Andrew Jackson. n14 Furthermore, the private ownership concept presented a real threat to the physical integrity of these invaluable records. Most of William Henry Harrison's papers went up in flames when the Harrison home in North Bend, Ohio, accidentally burned down. n15 The fortunes of war accounted for a substatial loss of John Tyler's papers when Richmond, Virginia, was burned in 1865. n16

n14. Berman, supra note 7, at 81.

n15. Id.

n16. Id.

Some presidential papers were destroyed on purpose rather than by accident. n17 Franklin Pierce apparently destroyed the papers from his four years in office. n18 Shortly before his death, Chester A. Arthur ordered the bulk of his official and personal papers burned. n19 Mrs. Warren G. Harding attempted to destroy all of her husband's correspondence, though her efforts were not entirely successful. n20 Robert Todd Lincoln was caught destroying his father's Civil War correspondence. n21

n17. I am indebted to Paul T. Heffron, Assistant Chief of the Library of Congress, Manuscript Division, for clarification of some of the details on presidential destruction of records, and for information with respect to the Library's acquisitions in this area.

n18. Berman, supra note 7, at 82.

n19. Hirshon, supra note 13, at 385.

n20. Berman, supra note 7, at 82.

n21. Id. An heir of President Washington was more well-meaning if only slightly less destructive:

I am now cutting up fragments from old letters & accounts, some of 1760 . . . to supply the call for Any thing that bears the impress of his venerated hand. One of my correspondents says send me only the dot of an i or the cross of a t, made by his hand, & I will be content.

Letter from George Washington Parke Curtis to John Pickett (Apr. 17, 1857), quoted in INDEX TO THE GEORGE WASHINGTON PAPERS XVI (1964).

The attitude taken by nineteenth-century Presidents regarding ownership of presidential papers is nowhere better illustrated than by Grover Cleveland's response to a Senate request for an executive file:

I regard the papers and documents withheld and addressed to me or intended for my use and action purely unofficial and private, not infrequently confidential, and having reference to the performance of a duty exclusively mine. . . . I suppose if I desired to take them into my custody I might do so with entire propriety, and if I saw fit to destroy them no one could complain. n22

n22. Letter from President Grover Cleveland to the United States Senate (Mar. 1, 1886), reprinted in 8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1787-1897, at 378 (J. Richardson ed. 1900).

An additional hindrance to the collection and preservation of presidential papers was the absence of an appropriate official depository. Presidents who might have been inclined to leave their papers to the public were dissuaded from doing so by the lack of any designated collection site. For example, President Benjamin Harrison, bequeathing his papers to his wife, said in his will that he had intended to keep his papers intact and ultimately available for historical research, but there was, as he put it, "no suitable place or organization . . . now available here." n23

n23. WILLS OF THE U.S. PRESIDENTS 151 (H. Collins & D. Weaver eds. 1976).

This perceived difficulty was greatly mitigated in 1897 by the establishment of the Manuscript Division of the Library of Congress. n24 The Manuscript Division presently embraces a significant portion of the papers of twenty-three Presidents, from George Washington to Calvin Coolidge. n25 These papers have come into the government's possession both by purchase and by gift. Theodore Roosevelt and his heirs deposited papers with this facility, as did William Howard Taft and his family. n26 Mrs. Woodrow Wilson donated her husband's

papers to the Manuscript Division fifteen years after his death. n27

n24. McDonough, Hoxie & Jacobs, supra note 10, at 5.

n25. Berman, supra note 7, at 82.

n26. Hirshon, supra note 13, at 386.

n27. See FINAL REPORT OF THE NATIONAL STUDY COMMISSION ON RECORDS AND DOCUMENTS OF FEDERAL OFFICIALS 13 (1977) [hereinafter cited as FINAL REPORT]; Hirshon, supra note 13, at 386.

The private ownership principle, however, has impaired the completeness of these collections and their accessibility to the public. Presidents have asserted their power of ownership to select and to limit access to the papers actually deposited. When Calvin Coolidge returned to private life in 1929, he gave to the Manuscript Division a large number of his papers, but his widow and his secretary subsequently admitted that President Collidge had voluntarily destroyed many papers before delivery. n28 Woodrow Wilson's papers could not be seen without his widow's consent until her death in 1961, n29 and the papers of Benjamin Harrison and William Howard Taft also were circumscribed by a requirement of prior family permission until 1945 and 1953, respectively. n30 President Lincoln's papers were not opened until 1947, eighty-two years after his death. n31

n28. FINAL REPORT, supra note 27, at 13.

n29. Id.

n30. Id.; Hirshon, supra note 13, at 385.

n31. Hirshon, supra note 13, at 383.

B. THE DEVELOPMENT OF PRESIDENTIAL LIBRARIES

The presidential library ushered in a new era in the care of presidential papers. Franklin D. Roosevelt was the first to establish such a library, n32 and his example was later followed by his predecessor, Herbert Hoover. n33 Each President thereafter has sought to establish a presidential library and, with the exception of Presidents Nixon and Carter, n34 each now has such a library.

n32. See infra text accompanying notes 39-40.

n33. "The Hoover Presidential Library was established at West Branch, Iowa . . . . Funds to erect the building were provided by The Hoover Birthplace Foundation." Hirshon, supra note 13, at 387.

n34. However, plans have been made and sites selected for the Carter library in Atlanta, Georgia, see N.Y. Times, July 16, 1982, at B4, col. 5, and the Nixon library in San Clemente, California, see N.Y. Times, May 28, 1983, at A6, col. 1.

The presidential library has been a response by latter-day incumbents of the office not only to the importance of preserving our historical heritage, but also to the sheer magnitude of the materials involved. This increase in

materials mirrors the enormous increase this century has seen in the scope of the functions of the Executive Branch. President Grant's staff numbered six persons, with an annual budget of $13,800; as recently as President Coolidge's time, only forty-six people worked immediately for the President, on a budget of $93,500. n35 The Executive Office of the President, created in 1939, has caused an enormous growth of the Presidency by placing numerous agencies under the President's direct power. n36 By 1971 its staff was in excess of 5,000 persons, and in fiscal 1973 its budget exceeded $64,000,000. n37

n35. J. KALLANBACH, THE AMERICAN CHIEF EXECUTIVE 440-41 (1966).

n36. Exec. Order No. 8248, 3 C.F.R. 576 (1938-43 comp.). The order set up the Executive Office of the President, staffed with six administrative assistants. The President made the crucial decision to transfer the Bureau of the Budget from the Treasury to the Executive Office where it rapidly grew to become the "general staff" to the entire executive branch. See W. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 1532-33 (1974). Subsequently, key agencies such as the Council of Economic Advisors, the National Security Council, and the Central Intelligence Agency were moved into the Executive Office of the President. Id. at 1415, 1848.

n37. 118 CONG. REC. 21,512-13 (1972) (statement of Alan C. Swan, Ass't Vice Pres., U. of Chicago).

Not surprisingly, the number of papers Presidents accumulate has grown accordingly. Presidential papers collections have burgeoned from Herbert Hoover's 1,300,000 pages for four years to Lyndon Johnson's 18,000,000 pages for five years and Richard Nixon's 46,000,000 pages for six years. n38 The pressures these collections have generated upon federal archival resources are almost intolerable, mandating separate facilities for their individual administration.

n38. FINAL REPORT, supra note 27, at 14.

On President Roosevelt's initiative, a joint congressional resolution in 1939 n39 authorized the United States Archivist to receive Roosevelt's papers, as well as related historical materials donated by other persons. Under the resolution, these materials were to be administered in a building to be erected with private funds on sixteen acres of land Roosevelt donated from his Hyde Park estate. n40 By the Presidential Libraries Act of 1955, n41 Congress authorized similar dispositions of other Presidents' papers.

n39. S.J.Res. 118, 53 Stat. 1062 (1939).

n40. Berman, supra note 7, at 83.

n41. Pub. L. No. 373, 69 Stat. 695 (codified as amended at 44 U.S.C. §§ 2107-2108 (1976)).

The establishment of presidential libraries, however, had no effect on the question of private ownership of presidential materials. Roosevelt's transfer of papers to his library was viewed as a gift. n42 The Presidential Libraries Act only provided for acceptance of any papers a President voluntarily chose to leave with the United States Archivist, subject to any restrictions the President deemed appropriate; it did not establish government ownership of the materials. n43 Thus, the assumption that Presidents own their personal papers

was not change by this statute, nor was it to change for another twenty-three years. n44

n42. Id. H.G. Jones, however, noted that "Roosevelt made his most significant departure . . . by recognizing the paramount right of the public and by subordinating this private claim to public custody, support, and management under the direction of civil servants governed by professional standards. This . . . fell short of the natural and logical goal. But it was a long, unprecedented step forward that no president thenceforth would be likely to disregard." H.G. JONES, THE RECORDS OF A NATION 147 (1969).

n43. See 44 U.S.C. § 2107 (1976). The Act allowed the President to leave his documents with the United States Archivist; it did not require that the documents be turned over.

n44. This is not to say that the assumption of presidential ownership had previously gone unquestioned. Indeed, in 1969 a study of the American Historical Association called the notion "a lingering vestige of the attributes of monarchy, not an appropriate or compatible concept . . . for the head of a democratic state." Fridley, supra note 12, at 37. Earlier conclusions to the same effect are set out in Cook, Private Papers of Public Officials, 38 AM. ARCHIVIST 300-01 (1975).

II. CONGRESSIONAL EXAMINATION OF PRIVATE OWNERSHIP

A. PRESIDENTIAL RECORDINGS AND MATERIALS PRESERVATION ACT

When President Richard Nixon resigned on August 9, 1974, he avowedly intended to take with him the over 40,000,000 pages of documents and 880 tape recordings he had accumulated while in office. n45 Government archivists even began to collect these materials and pack them for shipment to a government facility near his California home. When the Watergate Special Prosecutor expressed his continuing need for these materials, however, the new Ford administration, after negotiations with Judge Sirica, the Justice Department, and the Special Prosecutor, ordered preparations for shipment of the documents stopped. n46 Simultaneously, President Ford asked for his Attorney General's opinion as to the ownership of these materials. Attorney General Saxbe responded that the practice of former Presidents, and the absence of any statute to the contrary, generally supported ownership by the President. n47

n45. See FINAL REPORT, supra note 27, at 9.

n46. Id.

n47. 43 Op. Att'y Gen. No. 1 (Sept. 6, 1974).

Thereafter, on September 7, 1974, General Services Administrator Arthur F. Sampson entered into an agreement with Mr. Nixon under which the ex-President retained "all legal and equitable title" to the materials, which were to be "deposited temporarily" near the Nixon home in California, but in an "existing facility belonging to the United States." n48 The agreement stated Mr. Nixon's intention to "donate" the materials to the United States, subject to "appropriate restrictions." n49 No one was to have access to the materials except Mr. Nixon and the United States Archivist upon Nixon's authorization. n50 Mr. Nixon agreed "not to withdraw from deposit any originals of the Materials"

for a period of three years, after which he could exercise "the right to withdraw from deposit without formality any or all of the Materials . . . and to retain . . . [them] for any purpose." n51

n48. Letter of Agreement Between Former President Nixon and the Administrator of General Services, 10 WEEKLY COMP. PRES. DOC. 1104, 1104 (Sept. 8, 1974).

n49. Id.

n50. Id. It does not appear that the Archivist played any role in the negotiation of the agreement, and he apparently had no advance knowledge of it. See id. at 1104-05.

n51. Id.

The agreement made special provision for the tape recordings; they were to be donated to the United States "effective September 1, 1979." n52 In the meantime, the recordings were to remain deposited with Nixon's papers, although only Mr. Nixon (or persons he authorized) was to have access to them. n53 Of critical importance was a provision that, after September 1, 1979, "the Administrator shall destroy such tapes as [Mr. Nixon] may direct" and in any event the tapes "shall be destroyed at the time of [Mr. Nixon's] death or on September 1, 1984, whichever event shall first occur." n54 The tapes were otherwise not to be withdrawn, and reproduction of them could be made only by "mutual agreement." n55

n52. Id.

n53. Id. at 1104-05.

n54. Id. at 1104.

n55. Id. at 1105.

Congressional reaction to the public announcement of this agreement was as speedy as it was emphatic. Within ten days a bill was introduced which was designed, among other things, to abrogate the so-called Nixon-Sampson agreement. n56 Legislative action on the bill was complete by December 9, 1974, and it was signed into law by President Ford ten days later. n57

n56. See S. REP. NO. 1181, 93d Cong., 2d Sess. (1974); S. REP. NO. 1182, 93d Cong., 2d Sess. (1974). For a discussion of the legislative history of the bill, see Nixon v. Richey, 513 F.2d 430, 439-445 (D.C. Cir. 1975).

n57. Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695-99, 1701 (codified as amended at 44 U.S.C. §§ 2107 note, 3315-3324 (1976)). The statute is divided into two titles: title I, 44 U.S.C. § 2107 note, addresses the disposal of the Nixon presidential papers; title II, 44 U.S.C. §§ 3315-3324, establishes the National Study Commission on Records and Documents of Federal Officials.

The statute was called the Presidential Recordings and Materials Preservation Act. n58 Title I, specifically aimed at Mr. Nixon, directed the Administrator of General Services, notwithstanding any agreement or law to the contrary, to seize and retain possession of the tape recordings and the other documentary

materials accumulated during the Nixon administration. n59 These materials were not to be destroyed except as might later be provided by law. n60 Subject to applicable defenses or privileges, these documents were to be available in response to subpoena or other legal process, with priority accorded to the Watergate Special Prosecutor. n61 Mr. Nixon, or his designee, was to have access to the documents for any purpose consistent with the Act. n62 The Administrator's immediate task under the Act was to issue regulations covering these matters, and, most important, to screen the materials to determine which were official and which were personal. Those determined to be personal were to be returned to Mr. Nixon. n63 Congressional approval of these initial regulations was not required.

n58. 44 U.S.C. §§ 2107 note, 3315-3324 (1976).

n59. Presidential Recordings and Materials Preservation Act § 101, 44 U.S.C. § 2107 note (1976).

n60. Id. § 102(a).

n61. Id. § 102(b).

n62. Id. § 102(c).

n63. Id. § 104(a)(7).

Under the terms of the Act, eventual public access to any materials the Administrator permanently retained was to be governed by regulations promulgated by the Administrator. n64 These proposed regulations were to be submitted initially to Congress where either the House or the Senate could, by resolution within ninety days, disapprove them. n65 In formulating such regulations, the Act directed the Administrator to take into account seven enumerated factors. n66

n64. Id. § 104(a).

n65. Id. § 104(b)(1); see infra note 116.

n66. Section 104(a) of the Act set out the factors:

(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term ' Watergate' ;

(2) the need to make such recordings and materials available for use in judicial proceedings;

(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;

(4) the need to protect every individual's right to a fair and impartial trial;

(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise

limit access to such recordings and materials;

(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

Presidential Recordings and Materials Preservation Act § 104(a), 44 U.S.C. § 2107 note (1976).

The Act provided that the question of whether Mr. Nixon or the government owned the materials was to be determined by the judiciary in the first instance. n67 If that determination was in Mr. Nixon's favor, then Congress was to be understood as condemning the documents for a public use, and the courts would adjudicate fair compensation. n68

n67. Id. § 105(a).

n68. Id. § 105(c). See infra note 85 and accompanying text.

B. CHALLENGES TO THE ACT

1. Nixon v. Administrator of General Services

One day after the Presidential Recordings and Materials Act became law, Mr. Nixon challenged its constitutionality in a suit filed in the United States District Court for the District of Columbia. n69 The Act gave this court exclusive jurisdiction to hear constitutional challenges to the Act, as well as assertions of the invalidity of any regulation issued under it; to decide questions of title, ownership, possession, or control of any tape or document; and to award just compensation if the court determined that the Act had deprived any individual of private property. n70

n69. Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321 (D.D.C. 1976) (three-judge court). For a discussion of issues raised by title I of the Act, see Note, Government Control of Richard Nixon's Presidential Material, 87 YALE L. J. 1601-35 (1978).

n70. Presidential Recordings and Materials Preservation Act § 105, 44 U.S.C. § 2107 note (1976).

Because the Act's constitutionality was assailed, a special three-judge district court was convened. n71 That court concluded that because no regulations governing public access had yet been issued, only the issue of the Act's alleged facial unconstitutionality was appropriate for immediate resolution. n72 So limited, the court's inquiry focused upon the facial validity of the Act's provisions requiring the Administrator to take the tapes and documents into government custody for immediate screening by government archivists. n73 The district court, as later characterized by the Supreme Court, "conprehensively canvassed all the claims, and in a thorough opinion, concluded that none had merit." n74

n71. The three-judge district court was convened pursuant to 28 U.S.C. § 2282 (1970) (repealed Aug. 12, 1976) and 28 U.S.C. § 2284 (1970).

n72. Nixon v. Administrator of Gen. Servs., 408 F. Supp. at 334-340.

n73. Presidential Recordings and Materials Preservation Act § 103, 44 U.S.C. § 2107 note (1976).

n74. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 439 (1977).

The Supreme Court noted probable jurisdiction of Mr. Nixon's subsequent appeal n75 and, in an opinion issued June 28, 1977, affirmed the district court. n76 The Court accepted the district court's concept of the restricted scope of review appropriate under existing circumstances, noting that no regulations governing public access had yet become effective. n77 The Supreme Court determined, as had the district court, that the validity of any regulations would depend on their precise nature and that mere speculation as to their possible nature was not a proper basis for present adjudication. n78

n75. Nixon v. Administrator of Gen. Servs., 429 U.S. 976 (1976) (prob. juris. noted).

n76. Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977).

n77. Id. at 437-39. The Senate had disapproved the first set of regulations the Administrator submitted, as well as seven provisions of a second set of regulations later withdrawn in its entirety. The House of Representatives had disapproved several provisions of a third set. At the time of the Supreme Court's decision, the Administrator was preparing a fourth set of regulations.

n78. Id. at 438-39.

The Supreme Court considered each of five contentions made by Mr. Nixon, preliminarily rejecting certain intervenors' claims that only an incumbent President had standing to charge that the Act violated the constitutional concepts of separation of powers and executive privilege. n79 Addressing Mr. Nixon's claims on their merits, however, the Court found his arguments unavailing.

n79. Id. at 439, 448-49.

As to the separation-of-powers claim, the Court regarded as relevant that neither President Ford, who had signed the Act, nor President Carter, whose Solicitor General was before the Court vigorously urging the Act's validity, supported Mr. Nixon's position. n80 Rejecting the argument that the Constitution contemplates a complete division of authority among the three branches of government, the Court evoked settled doctrine that the Framers of the Constitution had not intended that the separate powers were "to operate with absolute independence." n81 Moreover, the Court adopted the district court's interpretation that the Act assured every party the opportunity to be informed in advance of any proposed release of papers, and guaranteed the chance to seek judicial review of any legally or constitutionally based right or privilege. n82 The Court held that the "custody and screening of the materials within the Executive Branch itself" was less intrusive than to have Congress or some outside agency perform the screening function, and combined with other

safeguards, "plainly guard[s] against disclosures barred by any defenses or privileges available to the appellant or the Executive Branch." n83 Additionally, the Court noted the "abundant statutory precedent for the regulation and mandatory disclosure of documents in the possession of the Executive Branch," citing as examples the Freedom of Information Act, the Privacy Act of 1974, the Government in the Sunshine Act, the Federal Records Act, and others, such as those relating to census records and tax returns. n84

n80. Id. at 441.

n81. Id. at 443 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

n82. Id. at 444.

n83. Id.

n84. Id. at 445.

The Court took pains to state that it saw "no reason to engage in debate [over] whether [Mr. Nixon] has legal title to the materials." The Court felt justified in ignoring this issue because the Act assured Mr. Nixon of just compensation if his economic interests were invaded, and because having legal title would not immunize his papers from any regulation considered to be in the public interest. n85

n85. Id. at 445 n.8.

The Court next turned to the "more narrowly defined claim that the Presidential privilege shields these records from archival scrutiny." n86 In United States v. Nixon n87 -- the famous Nixon tapes case -- the Court had recognized the existence of such a privilege, but held that the privilege yielded to the needs of the judicial branch. n88 In the instant case, however, Mr. Nixon was asserting the privilege against the Executive Branch itself, insisting that any breach in this case would "adversely affect the ability of future Presidents to obtain the candid advice necessary for effective decisionmaking." n89 Once again, the Court thought it significant that neither President Ford nor President Carter had supported Mr. Nixon's claim. n90 Conceiving that it was dealing only with "the bare claim that the mere screening of the materials by the archivists will impermissibly interfere with candid communication of views by Presidential advisers," n91 the Court found the question easy to resolve. Remarking that Mr. Nixon had not "called into question the District Court's finding that the archivists' 'record for discretion in handling confidential materials is unblemished,'" n92 and finding adequate justifications for "this limited intrusion into executive confidentiality," n93 the Court concluded that the Act on its face did not violate presidential privilege. n94

n86. Id. at 446.

n87. 418 U.S. 683 (1974).

n88. Id. at 713.

n89. 433 U.S. at 450.

n90. Id. at 449. See supra text accompanying note 69.

n91. 433 U.S. at 451.

n92. Id. at 451-52 (quoting Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321, 347 (D.D.C. 1976) (three-judge court)).

n93. Id. at 452.

n94. Id. at 455.

Mr. Nixon founded his third challenge upon the fundamental rights of expression and privacy guaranteed by the first, fourth, and fifth amendments to the United States Constitution; although he admittedly surrendered some privacy when he entered public life, he argued that his private and personal matters unrelated to his official duties deserved protection. n95 The Court pointed out, however, that a principal purpose of the screening process, as directed by Congress in the Act, was to identify and to return to Mr. Nixon any such personal items. n96 Conceding to Nixon a legitimate expectation of privacy in his personal communications, the Court nevertheless concluded:

n95. Id. at 455-57.

n96. Id. at 460.

The constitutionality of the Act must be viewed in the context of the limited intrusion of the screening process, of [Mr. Nixon's] status as a public figure, of his lack of any expectation of privacy in the overwhelming majority of the materials, . . . and of the virtual impossibility of segregating the small quantity of private materials without comprehensive screening. n97

n97. Id. at 465.

These circumstances, when considered together with the vital public purposes animating Congress to legislate as it did, prompted the Court to find Nixon's privacy claim without merit. n98

n98. Id.

Nixon derived his fourth contention from his position as head of a national political party, which had necessitated his devoting a significant amount of his working time during his presidency to partisan political matters. n99 Consequently, he argued that since his papers included records relating to these political activities, any archival screening would necessarily invade rights of associational privacy and political speech protected by the first amendment. n100

n99. Id. at 465-66.

n100. Id. at 466.

In the Court's view, however, this claim was to be measured by the inescapable fact that "no less restrictive way than archival screening has

been suggested as a means for identification of materials to be returned to [Mr. Nixon]." n101 The Court characterized the extent of any such burden on Mr. Nixon as "speculative" in view of the Act's protections against improper public disclosures and provision for judicial review; in any event, any burden was outweighed by the important governmental interests the Act advanced. n102 Moreover, the Court was not impressed by Mr. Nixon's concern for the Act's inhibiting effect on the political activity of future Presidents, which he claimed would thereby reduce the quantity and diversity of the political speech and association the nation would receive from its leaders. n103 The Court dismissed such concern with the single comment that it had not deterred President Ford from giving his approval to the law or President Carter from defending it in court. n104

n101. Id. at 467.

n102. Id. at 467-68.

n103. Id. at 468.

n104. Id. See supra notes 80, 90, and accompanying text.

Mr. Nixon's last constitutional contention was that the Act constituted a bill of attainder and therefore fell within the proscription in article I, section 9 of the Constitution against any law that legislatively determines guilt and imposes punishment upon an identifiable individual without a judicial trial. n105 Mr. Nixon submitted that Congress had acted on the premise that he had engaged in "misconduct," was an "unreliable custodian" of his own papers, and was deserving of a "legislative judgment of blameworthiness." n106 This argument was in some respects similar to the equal protection claim he had raised unsuccessfully in the district court but which, although included in the jurisdictional statement, was not pressed in the Supreme Court. n107 The Supreme Court expressly noted this similarity by saying that "[h]owever expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the States that legislatively burdens some persons as groups but not all other plausible individuals." n108 In particular, the district court had earlier concluded that article I, section 9 does not limit Congress "to the choice of legislating for the universe, or legislating only benefits, or not legislating at all." n109

n105. Article I provides: "No Bill of Attainder . . . shall be passed. . . ." U.S. CONST. art. I, § 9, cl. 3.

n106. 433 U.S. at 468 (emphasis deleted).

n107. See Nixon v. Administrator of Gen. Servs., 408 F.Supp. 321, 369-71 (D.D.C. 1976) (three-judge court); 45 U.S.L.W. 3076 (U.S. July 27, 1976) (questions presented).

n108. 433 U.S. at 471 (footnotes omitted).

n109. Id.

The Supreme Court found a number of reasons justifying Congress's decision to limit the Act's immediate reach to President Nixon's papers. First, only

those papers needed immediate attention, since the papers of all former Presidents from Hoover to Johnson were reposing in presidential libraries. Furthermore, Congress had special -- and ample -- reason to be concerned about the preservation of the Nixon materials because he alone had entered into an agreement which, by its terms, called for the destruction of some of them. "In short," said the Court, "[Mr. Nixon] constituted a legitimate class of one," thereby justifying Congress's decision "to proceed with dispatch with respect to his materials while accepting the status of his predecessors' papers and ordering the further consideration of generalized standards to govern his successors." n110 Alternatively, the Court held that the Act's commitment of the Nixon materials to the custody of, and to screening by, government archivists pending further regulations governing public access did not constitute an infliction of punishment within the constitutional proscription of bills of attainder. n111

n110. Id. at 472.

n111. Id.

2. Nixon v. Freeman

On December 16, 1977, the General Services Administration announced that regulations governing public access to the Nixon presidential materials had finally become effective after several earlier proposed regulations were rejected. n112 Shortly thereafter, Mr. Nixon sued the Administrator in the United States District Court for the District of Columbia to invalidate certain of the regulations. n113 The court granted defendant-intervenor status to the Reporters Committee for Freedom of the Press, the American Historical Association, the American Political Science Association, and a number of individual journalists and scholars. n114 On February 14, 1979, after prolonged settlement negotiations, an agreement was reached which called for amendments to the regulations and, in addition, disposed of all but two of Mr. Nixon's challenges. n115 The agreement also provided that neither side would rely on the Act's one-House veto provision to argue either for or against the constitutionality of the regulations. n116 The revised regulations resulting from the agreement became effective, without veto by either House, on March 7, 1980. n117

n112. See 42 Fed. Reg. 63,626 (1977) (codified as amended at 41 C.F.R. § 105.63 (1983)); supra notes 53-56, 66, and accompanying text.

n113. See Nixon v. Freeman, 670 F.2d 346, 349-50 (D.C. Cir. 1982), cert. denied, 103 S. Ct. 445 (1982). The district court opinion was not reported.

n114. See id. at 349.

n115. See id. at 349-50.

n116. See id. at 350 n.5. Officials who served under President Nixon, however, did challenge the regulations as unconstitutional because of the one-House veto provision. On December 30, 1983, Federal District Court Judge Thomas F. Hogan held the regulations invalid because the Presidential Recordings and Materials Preservation Act of 1974 under which they were promulgated authorized either house of Congress to veto them. Allen v. Carmen, No. 83-3099 (D.D.C. Dec. 30, 1983). Judge Hogan's ruling was based on the Supreme Court's

decision six months earlier in INS v. Chadha, 103 S. Ct. 2764 (1983), in which the Court held a one-House veto unconstitutional. Allen v. Carment, slip op. at 31-46. Judge Hogan's ruling blocked the plans by the government to give the public access to 1.5 million documents from the Nixon Administration. Id. at 45-46.

n117. 670 F.2d at 350. See 41 C.F.R. § 105.63 (1983).

The two issues not subject to the settlement agreement were the subject of cross-motions for summary judgment in the district court, which ruled against Mr. Nixon. n118 The United States Court of Appeals for the District of Columbia Circuit was confronted with these two issues, as well as with a claim that the district court had abused its discretion by denying further discovery after submission of cross-motions for judgment. n119

n118. See 670 F.2d at 350.

n119. Id. at 346.

Mr. Nixon first complained of the regulation's providing that the public may listen to, although not make reproductions of, reference copies of his tape recordings at the National Archives in Washington and at eleven other archival centers around the country. Mr. Nixon asserted that this regulation violated various personal privacy interests, as well as the presidential privilege of confidentiality. The Act's Administrator, he alleged, not only could use, but was required by the Constitution to use, less intrusive means of making this information available to the public. Mr. Nixon suggested allowing public access only to synopses or transcripts of the tapes, limiting public availability to the Watergate tapes alone, or restricting the availability of the Nixon tapes for a fixed period of time, such as twenty-five years or until the death of the participants in the recorded conversations. n120

n120. Id. at 353-54.

Mr. Nixon's second challenge related to the procedure by which the archivists planned to screen and identify tapes containing his personal diary. n121 Clearly, diary material was to be returned to him as "private or personal" material, n122 which the regulations defined as "relating solely to a person's family or other non-governmental activities, including private political associations, and having no connection with his constitutional or statutory powers or duties as President." n123 Such material could include a private diary even though it contained matters of general historical significance or recounted some events related to a President's official duties. n124

n121. Id. at 359-62.

n122. 41 C.F.R. § 105-63.401(a) (1983).

n123. Id. § 105-63.401(b).

n124. 670 F.2d at 361.

What the archivists essentially proposed to do was to listen to the dictabelts or other tapes to the extent necessary to determine whether they were personal diary records. If an introductory phrase or certain portions of a

tape revealed it to be a diary, the review would proceed no further. On occasion, however, the archivists might find it necessary to listen longer in order to be sure of their determination, mindful always that the regulations required the taking of all reasonable steps "to minimize the degree of intrusion into private or personal materials." n125

n125. 41 C.F.R. § 105.63.401-2(a) (1983).

Not persuaded that the district court had erred in holding for the government, the court of appeals affirmed, in an opinion issued in February 1982. n126 The Supreme Court denied certiorari. n127 Presumably, now that the legal questions have been resolved, the final processing of these materials can go forward to completion in accordance with the Act. n128

n126. Nixon v. Freeman, 670 F.2d 346 (D.C. Cir. 1982), cert. denied, 103 S. Ct. 445 (1982).

n127. 103 S. Ct. 445 (1982).

n128. For a discussion of the continuing attempts to block release of the documents, see supra note 116.

III. JUDICIAL EXAMINATION OF PRIVATE OWNERSHIP

The question of the legal ownership of presidential documents, however, remains in limbo, a legal question which for lack of controlling judicial authority has remained unresolved since the beginning of the Republic. The relevant cases are, at best, tangential in their impact. In 1841, Supreme Court Justice Joseph Story, sitting on a federal circuit court, upheld the validity of a copyright on official letters George Washington had written while he was President. n129 These were the same letters that Washington had bequeathed to his nephew, Justice Bushrod Washington, and that Congress had later purchased -- seven years before the copyright case arose. n130 Before Congress bought the letters, however, Chief Justice Marshall and Jared Sparks had acquired an interest in the letters and Sparks had published a twelve-volume work reprinting many of circuit court's decision held only that Spark's copyright in the work barred private parties from pirating the materials for sale; although this established that Washington initially had one form of ownership of his official papers, the court further held that this was not an ownership right that could be asserted against the government. n132 Congress could publish the papers over the copyright holder's objection, Story said, or could require that the documents be kept secret if circumstances required. n133

n129. Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

n130. See supra notes 8-10 and accompanying text.

n131. Marshall was allowed to use the original papers from 1804 to 1807, while writing his Life of George Washington. Washington's nephew gave Jared Sparks, editor of the North American Review, permission to use eight boxes of the former President's papers to help Sparks prepare The Writings of George Washington, published in 1858. These eight boxes remained in Sparks's possession for the next ten years. Berman, supra note 7, at 81.

n132. Folsom v. Marsh, 9 F. Cas. 342, 347 (C.C.D. Mass. 1841) (No. 4,901).

n133. Id.

Many years later a state trial court in New York upheld the validity of Franklin D. Roosevelt's transfer of his presidential materials to the government in connection with the creation of his presidential library. n134 The court so ruled, however, without defining precisely the nature of the interests that Roosevelt purported to convey. n135

n134. In re Roosevelt's Will, 190 Misc. 341, 73 N.Y.S.2d 821 (Surr. Ct. 1947).

n135. Id.

The Twin Cities, Minneapolis and St. Paul, was the locale more than twenty-five years ago of the litigation which centered most squarely on the question of who owns papers created by a federal employee in the discharge of official duties. The papers in issue could possibly be regarded as presidential in nature since they were brought into being upon the explicit order of President Thomas Jefferson and in accordance with his detailed instructions.

President Jefferson had long been fascinated by the vast Louisiana Territory which stretched from the Mississippi River to the Continental Divide -- so much so, indeed, that he compromised his strict constitutional constructionism somewhat when the opportunity arose to buy the Territory from Napoleon. n136 Even before the Louisiana Purchase was consummated, Jefferson mounted an expedition to explore the territory acquired and the Northwest country beyond, selecting Captains Meriwether Lewis and William Clark as the leaders of this venture. In an 1803 letter of instructions to Lewis, who was also Jefferson's private secretary, Jefferson wrote: "Your observations are to be taken with great pains & accuracy, to be entered distinctly & intelligibly for others as well as yourself. . . . In re-entering the U.S. and reaching a place of safety . . . repair yourself with your papers to the seat of government." n137

n136. See E. S. BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE 1803-1812, at 23-29 (2d ed. 1972).

n137. See First Trust Co. v. Minnesota Historical Soc'y, 146 F. Supp. 652, 657 (D.Minn. 1956), aff'd sub nom. United States v. First Trust Co., 251 F.2d 686 (8th Cir. 1958).

One hundred fifty years later, in St. Paul, Minnesota, a granddaughter of General John Henry Hammond, while preparing to close her mother's house after her death, came across numerous old papers in the General's desk in the attic. Concluding that some of the documents might be of historical interest, she invited the Minnesota Historical Society to send some papers interesting and apparently asked for -- and received -- permission to take them back to the Society for more careful examination. n139 Two months later the St. Paul Dispatch carried a front-page story to the effect that the Society had acquired "a priceless collection of papers" and identified them as "long-missing papers covering the first 1,600 miles of the famed Lewis and Clark expedition." n140 There were sixty-seven separate pieces of paper, mainly in Captain Clark's handwriting, but with a few insertions by Captain Lewis. n141

n138. See St. Paul Dispatch, Oct. 19, 1953, at 1, col. 2; see also 146 F. Supp. at 654. General Hammond, who died in 1890, had fought with great distinction in several major Civil War battles and had served on General Sherman's staff. After the war he went west and engaged in a variety of activities. For instance, at one time Hammond was the personal representative of Carl Schurz, Secretary of the Interior under President Hayes, who was trying to reform the somewhat corrupt Administration of Indian Affairs. How General Hammond got the papers remains a mystery. See infra notes 152-53 and accompanying text.

n139. 146 F. Supp. at 654.

n140. St. Paul Dispatch, Oct. 19, 1953, at 1, col. 2.

n141. 146 F. Supp. at 655-56.

Members of the Hammond family were not only surprised that such papers existed, but were even more surprised to learn that they now belonged to the Minnesota Historical Society. The First Trust Company of St. Paul, as the executor of the deceased homeowner's estate, promptly included the papers in the estate's property inventory n142 and notified the Society to regard itself merely as the custodian of the papers until the question of legal title could be settled. n143 The First Trust Company's attorney thereafter filed an action to quiet title in state court, naming as potential claimants the two surviving daughters of General Hammond, John Doe and Mary Roe as the unknown survivors of Captain Clark, and the Minnesota Historical Society. Prompted by the 1803 letter from Jefferson, quoted above, instructing Lewis to "repair yourself with your papers to the seat of government," the attorney also added the United States to the list of potential claimants. n144

n142. The First Trust Company had first drawn up the inventory excluding the Clark papers. But when confronted with the sudden appearance of a very valuable asset (the newspapers estimated the value of the Clark papers at $20,000), the First Trust Company felt itself legally obligated "to gather into the estate whatever assets might lawfully belong to it." Tomkins, Annals of Law: The Lewis and Clark Case, THE NEW YORKER, Oct. 29, 1966, at 107.

n143. 146 F.Supp. at 654.

n144. Id.

Although the federal government at first was apparently as surprised as everyone else by its inclusion as a potential claimant, it took its role seriously. Asserting its legal ownership of the Clark papers on the basis of Jefferson's letter, it successfully sought removal of the case from the state court to the United States District Court for the District of Minnesota, sitting in Minneapolis. n145

n145. Id. at 653-54.

Meanwhile, Louis Starr, a grandson of General Hammond who lived in New Jersey, grew increasingly exercised by the high-handedness he perceived to be exhibited toward his family by both the Minnesota Historical Society and the federal government. n146 He approached Donald Hyde, a lawyer friend who was also a distinguished book collector widely known in the literary and library

fields. Although initially reluctant to get involved, Mr. Hyde changed his mind and agreed to assist Mr. Starr after one of his law partners had discussed the matter in Washington with an Assistant Attorney General. n147

n146. Louis Starr was a partner in the New York financial firm of Laidlaw & Co. and had never known his grandfather, General Hammond. He nonetheless became irritated enough to intervene in the suit. See Tomkins, supra note 142, at 111-12.

n147. Id. at 112.

Mr. Hyde conceived of the case as

"not an isolated one but [as] an initial move in a plan to assemble in the National Archives all original data and documents which the National Archives Establishment may deem of value and interest and which were compiled or prepared by federal officials of all ranks while in the employ of the United States of America." n148

n148. Id.

Painfully aware that generally the statute of limitations does not run against the government, n149 he feared that the government might make widespread claims for the return of documents that had been in private hands for a hundred years or more. Many university and private libraries and museums, as well as many private collectors, began to voice a real sense of alarm, and their attention was sharply fixed upon the proceedings in the federal court in Minneapolis. n150

n149. Id.

n150. Donald Hyde, as a book collector, saw the government's claim in the Lewis and Clark case as a threat to all great American historical collections. Id. at 113. He drafted a statement explaining the potential consequences of a government victory: "'The implications and ramifications of this lawsuit are so widespread, . . . that we feel that a committee of those interested should organize forthwith to resist the claim of the United States.'" Id.

Copies of this statement were sent to a large number of collectors, curators of university libraries, and historical society officials. Id. Although most agreed that the principle involved was extremely important, few wanted to associate themselves with the lawsuit, presumably because "'[t]hey just didn't think we [Starr and Hyde] had a chance of winning.'" Id.

The trial, before Judge Nordbye, lasted four days. To some observers it appeared like "an extraordinarily alert graduate seminar in history," particularly when Professor Ernest S. Osgood, of the University of Minnesota, testified for the government. It was said that Professor Osgood's "intimate knowledge of the documents sometimes made him sound as though he had been present on the expedition," n151 and the participation in the case of three of his former students further enhanced the academic aura of the proceedings.

n151. Id. at 115.

It was not established at the trial, and remains unclear to this day, just how Captain Clark's rough notes of the early days of the expedition ended up

in the Hammond attic in St. Paul. n152 Testimony that the matters referred to in the rough notes had been incorporated in more formal notebooks eventually delivered to Jefferson, which Jefferson had then deposited in the library of the American Philosophical Society in Philadelphia, appeared to impress Judge Nordbye and to substantiate the theory that both President Jefferson and Captain Clark conceived of the rough notes as Captain Clark's personal property. n153 In any event, the court held that the federal government had the burden of establishing its title and had failed to do so; thus, the notes were the property of the Hammond family. Therefore, although awarding title to a party other than the government, the court settled nothing with respect to the law of ownership of presidential papers. An appeal to the Eighth Circuit was unsuccessful, n154 and the federal government made no effort to seek Supreme Court review. n155

n152. Although several theories have been advanced, it now appears that no one will ever know how General Hammond obtained the papers. See 146 F.Supp. at 668.

n153. See 146 F.Supp. at 660-62. A critique, from the perspective of an historian, of the finding that these notes were personal appears in Boyd, These Precious Moments of . . . Our History, 22 AM. ARCHIVIST 147 (1959).

n154. United States v. First Trust Co., 251 F.2d 686 (8th Cir. 1958).

n155. Both sides appear to have been vaguely disappointed that nothing much was settled with respect to the law of ownership in this area, and private collectors and institutions continued to eye the federal establishment with apprehension. The Hammond family reached a settlement with the Minnesota Historical Society under which the Society received payment for its professional services and the family got the papers. Five years later the Yale Library was given the papers by Frederick W. Beinecke, who had bought them from the family. See Tomkins, supra note 142, at 121. Mr. Beinecke's generosity extended to the financing of their publication by the Yale University Press in an impressive volume edited and annotated by Professor Osgood. See THE FIELD NOTES OF CAPTAIN WILLIAM CLARK, 1803-1805 (E. Osgood ed. 1964).

IV. RESOLVING THE DILEMMA -- THE PRESIDENTIAL RECORDS ACT

By its terms, title I of the Presidential Recordings and Materials Preservation Act applies only to ex-President Nixon. n156 Title II of the Act n157 was regarded by Congress as of perhaps even greater importance than title I. Recognizing that the nation had long suffered from the absence of a clear and definite policy with respect to the treatment of the papers of federal officials, title II created a National Study Commission on Records and Documents of Federal Officials to recommend appropriate legislation in this area. n158

n156. See supra notes 58-68 and accompanying text.

n157. 44 U.S.C. §§ 3315-3324 (1976).

n158. Id.

The Commission consisted of two public members, two members each from the House of Representatives and the Senate, and one representative each of the Executive Office of the President, the Departments of State, Defense, and

Justice, the federal judiciary, the Library of Congress, the General Services Administration, the Society of American Archivists, the Organization of American Historians, and the American Historical Association. A former United States Attorney General, the Honorable Herbert Brownwell, chaired the Commission. The Commission held a number of public hearings in Washington and around the country and heard many witnesses, issuing its final report on March 31, 1977. n159

n159. FINAL REPORT, supra note 27.

In its report, the Commission made two recommendations: (1) all documentary materials made or received by federal officials in connection with their constitutional and statutory duties should be the property of the United States, and (2) for purposes of disposition and access, publicly-owned documentary materials should be classified either as "federal records" or as "public papers." In regard to those recommendations relating to the President, the Commission stated explicitly its intent that they also apply to the Vice President. n160

n160. See id. at 32.

In distinguishing between federal records and public papers, the Commission noted that federal records are defined by statute as "documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States government under Federal Law or in connection with the transaction of public business." n161 Since the statute applied only to agency records, including the official records of the lower federal courts, the Commission maintained that it should be amended to include, in addition to Congress and the Supreme Court, units of the Executive Office other than those solely functioning to advise and assist the President. n162

n161. 44 U.S.C. § 3301 (1976).

n162. FINAL REPORT, supra note 27, at 29.

The Commission concluded that "public papers" lie somewhere between federal records and what are clearly personal papers. These public papers include such documents as "confidential communications between an official and his staff; working papers reflecting the decision-making process; conference notes; and various other materials found in presidential papers, the office files of Members of Congress, and the chamber files of judges." n163 According to the Commission, these materials had previously been treated as the property of the officials in question and removable by them, frequently with dire and undesirable consequences for the preservation of, and future public access to, the papers. In the Commission's view, all such public papers should be regarded as public property. n164

n163. Id. at 6.

n164. Id.

Contrastingly, the Commission narrowly defined the personal papers of federal officials to include only those materials of a purely private or non-official character which were neither created nor received in connection with constitutional or statutory duties. Personal papers might include diaries, family records, and correspondence unrelated to official duties. n165

n165. Id. at 31-32.

The Commission determined that a President's public papers should consist of all documentary materials made or received by the President's immediate staff in connection with the President's constitutional or statutory duties, along with similar materials made or received by units of the Executive Office of the President whose sole function is to advise and assist the President. n166 The documentary materials of all other units of the Executive Office would be classified as federal records, accessible under the Freedom of Information Act n167 and disposed of under title 44 of the United States Code. n168

n166. Id. at 29.

n167. See 5 U.S.C. § 552 (1982).

n168. Title 44 provides:

The Administrator may promulgate schedules authorizing the disposal, after the lapse of specified periods of time, of records of a specified form or character common to several or all agencies if such records will not, at the end of the periods specified, have sufficient administrative, legal, research, or other value to warrant their further preservation by the United States Government.

44 U.S.C. § 3303a(d) (1976).

The Commission further recommended that a President be authorized to restrict access to presidential public papers for a period not to exceed fifteen years after the conclusion of the President's term in office. Thereafter, public papers would be generally accessible, subject only to such restrictions as are necessary in the interest of national security or to protect against a clearly unwarranted invasion of privacy. Judicial review should be available for persons denied access after the fifteen-year closure period. n169

n169. FINAL REPORT, supra note 27, at 31.

Finally, the Commission recommended that presidential public papers be transferred to the custody of the Archivist of the United States immediately upon conclusion of the President's term of office. The Archivist would deposit such materials in an archival facility he or she operated and would remain responsible for their custody and preservation. n170 This archival facility could, of course, include a presidential library which, although built with private funds, is maintained and operated by federal personnel at federal expense. n171 The Archivist would have authority to dispose of material which he or she believed lacked sufficient value to justify permanent retention, but would first be required to prepare a disposition schedule to be published in the Federal Register and to give Congress notice at least sixty days in advance of any proposed disposition. n172

n170. Id. at 30.

n171. Id. at 32.

n172. Id. at 30.

The Commission was not unmindful of what a President's obligations should be while in office. Through implementation of records management controls, the President should assure that activities, deliberations, decisions, and policies are adequately recorded and maintained. The President would be permitted to dispose of public papers having no further administrative, historical, informational, or evidentiary value, provided that: (1) the Archivist's prior concurrence is obtained; (2) the disposition schedule is published in the Federal Register; and (3) Congress is given sixty-days' advance notice of the planned disposition. n173

n173. Id. at 29.

The Commission's report was issued unanimously except for an alternative proposal by Chairman Brownell and Senator Weicker. That proposal would have made the papers of all government branches immediately subject to the Freedom of Information Act and would have dispensed with the fifteen-year time restriction. n174

n174. Id. at 99, 107-11.

Congressional response to the Commission's recommendations has been limited. Congress has done nothing to implement the Commission's recommendations with respect to Congress itself, the federal judiciary, or the regulatory agencies. Claiming that congressional papers had to be disposed of by the separate rules of each House and could not constitutionally be governed by statute, n175 Congress contemplated hearings to explore possible rules, but it appears that no rules have eventuated. Any constitutional barriers to joint action, however, should not deter Congress from imposing on itself a papers-disposition policy substantially similar to that which now applies to the President.

n175. Presidential Records Act of 1978: Hearings Before a Subcomm. of The Comm. on Government Operations, 95th Cong., 2d Sess. 75-77 (1978) (statement of Rep. Ertel) [hereinafter cited as Hearings].

Congress imposed a papers-disposition policy on the President by enacting in 1978, the year following the Commission's final report, the Presidential Records Act of 1978 n176 -- a statute which one of its managing committees characterized as terminating "the tradition of private ownership of Presidential papers and the reliance on volunteerism to determine the fate of their disposition." n177 The Act was made effective on January 20, 1981, n178 and thus President Reagan is the first President to be affected by it. This prospective operation should ameliorate any legal problems resulting from perceived betrayals of confidences or frustrated expectations of privacy.

n176. Pub. L. No. 95-591, 92 Stat. 2523 (codified at 44 U.S.C. §§ 2201-2207 (Supp. V 1981)).

n177. H.R. REP. NO. 1487, 95TH CONG., 2D SESS. 2, REPRINTED IN 1978 U.S. CODE CONG. & AD. NEWS 5732.

n178. See 44 U.S.C. § 2201 note (Supp. V 1981).

The Act defines presidential records as those documents created by the President (or by his advisers) "in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional,

statutory, or other official or ceremonial duties of the President." n179 This definition includes political activities with a direct effect on official duties, such as a President's promise to support legislation in return for an interest group's promise to campaign for the President's reelection. n180

n179. Id. § 2201(2).

n180. See 124 CONG. REC. 36,844 (1978) (statement of Sen. Percy).

The President may keep personal records relating to private activities. n181 Sensitive to the Supreme Court's observations in the nixon case, Congress included among these private activities private political associations having no direct effect on the President's public duties or presidential campaign. n182 The Act directs the President to maintain separate files for those records that the President and the President's staff determine are public and those they denominate as private. n183 Additionally, the Act places an affirmative duty on the President to create and maintain adequate documentation of official activities. n184

n181. 44 U.S.C. § 2201(3) (Supp. V 1981).

n182. Id. § 2201(3)(B); see 124 CONG. REC. 36,844-45 (1978) (statement of Sen. Nelson). For the sort of comment Senator Nelson might have had in mind, see Nixon v. Administrator of Gen. Servs., 433 U.S. 425,467 (1977) ("It is, of course, true that involvement in partisan politics is closely protected by the First Amendment. . . .").

n183. 44 U.S.C. § 2203(b) (Supp. V 1981). By the terms of the Act itself, the President is only directed to turn over to the Archivist "Presidential records," 44 U.S.C. § 2203(f)(1) (Supp. V 1981), which are defined as documents separate from "personal records," id. § 2201. Although one brief statement on the Senate floor implies otherwise, see 124 CONG. REC. 36,845 (1978) (statement of Sen. Nelson) (guidelines will help Archivist draw line between personal and presidential records), the legislative history generally supports the view that the Archivist would have no role in separating personal from presidential records. See Hearings, supra note 175, at 113-14 (statement of Dep. Ass't Att'y Gen. Hammond); id. at 47 (colloquy between Rep. Quayle and Phillip Buchen, former counsel to President Ford); id. at 164 (statement of Mr. Rhoads, Archivist).

n184. See 44 U.S.C. § 2203(a) (Supp. V 1981).

Procedures are also established for the disposition of such presidential materials. The President may choose to restrict public access for up to twelve years to any record falling within one or more of six enumerated categories, including materials that are: (1) classified, (2) related to appointments to public office, (3) exempted by statute from disclosure, (4) trade secrets and confidential commercial or financial information, (5) confidential communications between the President and others, or (6) personnel and medical files. n185 Upon receiving presidential materials, the National Archivist must decide which materials fit into the enumerated categories, and must consult the President before making any determinations. The President can challenge a classification in court as an infringement of executive rights or privileges. The public can express opposition to these decisions only through an administrative proceeding not subject to judicial review. n186

n185. Id. § 2204.

n186. Id. § 2204(b)(3).

The public can seek access to restricted documents after the twelve-year time period has elapsed and, under the Freedom of Information Act (FOIA), to nonrestricted documents after archival processing is concluded. Exemption 5 of the FOIA, covering inter-and intra-agency memoranda, is not available to restrict access, n187 but presidential privilege may still be invoked. Over and above the FOIA, the Archivist has an affirmative duty under the Act to make materials publicly available when it is appropriate to do so.

n187. Id. § 2204(c)(1).

Special access rights are given even for restricted documents. The archivists may see them, and, subject to any constitutional rights and privileges, access is guaranteed (1) for judicial proceedings, (2) to incumbent Presidents who need information not otherwise available for official business, and (3) to Congress. n188

n188. Id. § 2205(2).

It is obvious that the 1978 Act is a long stride forward from the days when private ownership was the premise upon which Presidents approached the handling and ultimate disposition of their papers. Presumably it still remains open to a future President to assert that Congress cannot deprive him or her of such property without just compensation, but, since there would seem to be no serious contention that the taking was not for a significant public use, the only issue would be the amount of compensation to be paid. The prospective operation of the Act, however, appears to make it most unlikely that any such contention will ever be made.

Individuals have expressed fears that too close and intrusive regulation of a President's powers over his or her own records, and, particularly, too expansive a definition of public papers at the expense of a shrinking area of those regarded as personal, will cause Presidents to change their methods of operation. n189 personal, will cause Presidents to change their methods of operation. n189 It also remains to be seen whether, because of the Act, Presidents will neglect writing letters and memoranda or keeping minutes of important meetings to such an extent that later generations will lack the means of either knowing or understanding exactly what has shaped their history.

n189. See Rhoads, Who Should Own the Documents of Public Officials?, PROLOGUE, Spring 1975, at 33; Schlesinger, Who owns a President's papers?, Wall St. J., Feb. 26, 1975, at 16; Wigdor & Wigdor, The future of Presidential Papers, in The Presidency and Information policy, supra note 7, at 92 (criticizing the 1978 Act).

V. CONCLUSION

Many historians believe that personal papers are not only useful but almost essential for complete analysis of the forces that move and inform public activity. A distinguished English historian has written that "[p]rivate papers ought to be the great security against official secrecy." n190 There is enough to this to suggest that one of the most important, as well as one of the most

delicate, tasks in administering the new Presidential Records Act will be to draw the line between public papers, on the one hand, and personal papers, on the other. Even the Solicitor General, supporting the Act during argument of Nixon v. Administrator of General Services n191 before the Supreme Court, conceded that personal papers could validly include those which would be of great historical interest. n192

n190. A.J.P. Taylor, Keeping It Dark, 13 ENCOUNTER 43 (1959).

n191. 433 U.S. 425 (1977).

n192. See id. at 488 & n.* (White, J., concurring).

Whatever problems remain, the Presidential Records Act of 1978 is an event of importance. It holds great promise for the preservation and meaningful use of one of our great national treasures. Its successful functioning in practice may even persuade Congress that, as recommended by the National Study Commission, what is good for Presidents may also be good for Congressmen -- and even for judges.

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